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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 3/2018 concerning Chayapha Chokepornbudsri (Thailand)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed that mandate of the Commission. The mandate of the Working Group was most recently extended for a three-year period in Council resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 12 December 2017, the Working Group transmitted to the Government of Thailand a communication concerning Chayapha Chokepornbudsri. The Government provided initial clarifications on 13 December 2017. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Chayapha Chokepornbudsri, born on 11 November 1966, is a Thai national. Prior to her detention, Ms. Chayapha worked as an accountant. Her usual place of residence was Mueang District, Samut Prakan Province, Thailand.

5. In the early morning of 19 June 2015, a group of military personnel from the 2nd Infantry Division and police officers from the Technology Crime Suppression Division arrested Ms. Chayapha at her residence while she was preparing to go to work. Officers searched her house, confiscated her laptop and mobile telephone and took Ms. Chayapha to the 11th Infantry Battalion Military Circle in Bangkok. She was detained there for four days before being remanded to the custody of the police.

6. Reportedly, the authorities did not produce an arrest warrant at the time of Ms. Chayapha's arrest. The Bangkok Military Court issued arrest warrant No. 2/2015 only on 22 June 2015 — three days after Ms. Chayapha was taken into military custody. On 23 June 2015, Ms. Chayapha was remanded to the custody of police from the Technology Crime Suppression Division at the Thung Song Hong Police Station in Bangkok. She was charged with violating the provisions of section 112 (lese-majesty) and of section 116 (sedition) of the Penal Code.

7. On 24 June 2015, Ms. Chayapha appeared at a televised press conference organized by the police and confessed to the crimes for which she had been charged.

8. On 25 June 2015, Ms. Chayapha was transferred to the Bangkok Military Court for a pretrial detention hearing. The Court rejected her request for bail on the grounds that she was a potential flight risk. Ms. Chayapha was then taken to the Central Women's Correctional Institution.

9. The source submits that, throughout the period of her initial detention, Ms. Chayapha had no access to a lawyer. While she was in military custody, army personnel reportedly threatened that she could face a harsher prison sentence if she sought access to legal counsel.

10. Ms. Chayapha was charged with two counts of lese-majesty (section 112 of the Penal Code) for posting two messages on Facebook, on 10 and 11 June 2015, which, according to the authorities, referred to the involvement of the Thai royal family in Thai politics. In addition, Ms. Chayapha was charged with three counts of sedition (section 116 of the Penal Code) for posting three messages on Facebook, on 11 and 12 June 2015, which the authorities interpreted as a suggestion that a military counter-coup was under way against the junta.

11. On 15 December 2015, Ms. Chayapha was taken to the Bangkok Military Court for a closed trial. Neither Ms. Chayapha nor her lawyer were given sufficient notice about the court hearing. Without a lawyer representing her in court, Ms. Chayapha decided to plead guilty to the charges. As a result, the court immediately sentenced her to 10 years in prison on two counts of lese-majesty and 9 years in prison on three counts of sedition. The court halved the 19-year sentence to nine and a half years in consideration of Ms. Chayapha's guilty plea. She was then returned to the Central Women's Correctional Institution to serve her sentence, where she remains today.

12. The source considers that Ms. Chayapha's deprivation of liberty falls within categories II and III of the Working Group.

13. In relation to category II, the source submits that Ms. Chayapha's deprivation of liberty is arbitrary because it results from her exercise of the rights and freedoms guaranteed by article 19 of the Universal Declaration of Human Rights and article 19 of the International Covenant on Civil and Political Rights, to which Thailand is a State party. Article 19 of the Universal Declaration of Human Rights states that everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Article 19 (2) of the Covenant states that everyone has the right to

freedom of expression; that right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his or her choice.

14. In relation to category III, the source argues that the non-observance of the international norms relating to the right to a fair trial guaranteed by article 14 of the Covenant is of such gravity as to give the deprivation of liberty of Ms. Chayapha an arbitrary character. In this respect, the source submits that Ms. Chayapha was not informed promptly and in detail of the nature and cause of charges brought against her and did not have adequate time for the preparation of her defence. She was also denied her right to receive legal assistance at all stages of the proceedings and her right not to be compelled to testify against herself or to confess her guilt. These rights are guaranteed by article 14 (3) (a), (b), (d) and (g) of the Covenant.

15. In addition, the source submits that the trial that resulted in her prison sentence was conducted behind closed doors in a military court, in violation of article 14 (1) and (5) of the Covenant. The source notes that, as a result of the declaration of martial law by the Thai Army on 20 May 2014, the National Council for Peace and Order issued Announcement 37/2014 on 25 May 2014. Military courts assumed jurisdiction over lese-majesty cases for offences committed after that date. Between May 2014 and February 2016, Thai military courts have tried and sentenced to prison 24 defendants in lese-majesty cases, including Ms. Chayapha.

16. The source notes that individuals who allegedly committed lese-majesty offences between 25 May 2014 and 31 March 2015 had no right to appeal the decision made by the military courts as a result of the declaration of martial law and in accordance with article 61 of the Military Court Act of 1955. It is argued that this constitutes a violation of article 14 (5) of the Covenant, which prescribes that everyone convicted of a crime has the right to his or her conviction and sentence being reviewed by a higher tribunal.

17. The source further submits that the trial of Ms. Chayapha in a military court is also in breach of article 14 (1) of the Covenant, which states that everyone has the right to a "fair and public hearing by a competent, independent and impartial tribunal".

18. The source also argues that Thai military courts are not independent from the executive branch of the Government. Military courts are units of the Ministry of Defence, and military judges are appointed by the Army Commander-in-Chief and the Minister of Defence. The source also submits that military judges lack adequate legal training. Lower military courts in Thailand reportedly consist of panels of three judges, and only one of them has legal training. The other two judges are commissioned military officers who sit on the panels as representatives of their commanders.

19. With regard to the right to a public hearing, the source notes that lese-majesty trials in military courts have been characterized by a lack of transparency. Military courts have held many lese-majesty trials behind closed doors. Military judges have routinely barred the public, including observers from international human rights organizations and foreign diplomatic missions, from entry into the courtroom. On numerous occasions, military courts claimed that closed proceedings were necessary because lese-majesty trials were a matter of national security and could affect public morale.

20. The source also argues that Ms. Chayapha's prolonged pretrial detention and the military court's refusal to grant her bail is a violation of article 9 (3) of the Covenant, which states that "it shall not be the general rule that persons awaiting trial shall be detained in custody". The source also refers to Human Rights Committee general comment No. 8 (1982), in which the Committee stated that pretrial detention should be an exception and as short as possible. In this context, the source notes that only 4 of the 66 individuals (6 per cent) arrested for alleged violations of section 112 of the Penal Code after the military coup of 22 May 2014 were released on bail pending trial. Courts have regularly denied bail to defendants in lese-majesty cases, including Ms. Chayapha, by claiming that they would be flight risks.

21. Furthermore, the source argues that the court's argument that the potential punishment is very severe and that Ms. Chayapha is a flight risk and should therefore not be

granted bail runs contrary to international human rights standards and jurisprudence of United Nations human rights bodies. In its general comment No. 35 (2014) on liberty and security of person, the Human Rights Committee stated that detention pending trial must be based on an individualized determination that it is reasonable and necessary taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should not include vague and expansive standards such as "public security". The Committee also noted that pretrial detention should not be ordered based on the potential sentence for a crime; rather, it should be based on a determination of necessity.

Initial clarifications from the Government

22. On 12 December 2017, the Working Group transmitted the allegations from the source to the Government under its regular communication procedure. The Working Group requested the Government to provide detailed information before 12 February 2018 about the current situation of Ms. Chayapha. The Working Group also requested the Government to clarify the legal provisions justifying her continued detention, as well as the compatibility of her detention with the obligations of Thailand under international human rights law. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of Ms. Chayapha.

23. On 13 December 2017, the Government acknowledged receipt of the communication and undertook to send the Working Group further information. The Government provided initial clarifications on the use of lese-majesty law and the military court, as follows.

24. According to the Government, it supports and values freedom of expression and believes that such freedom is the basis of a democratic society and that the people can freely exercise it. Nevertheless, such a right is not absolute and must be exercised within the boundary of the law.

25. The Government claims that the application of the lese-majesty law is in accordance with the above-mentioned objectives. The Thai monarchy has been a pillar of stability in Thailand, and the Thai sense of identity is closely linked to the monarchy. The lese-majesty law is not aimed at curbing people's right to freedom of expression but instead has the objective of giving protection to the rights or reputation of the King, the Queen and the heir-apparent of the Regent in a similar way as libel law does for commoners. It is not aimed at curbing people's right to freedom of expression.

26. In the Government's view, as with other criminal offences, proceedings on lese-majesty cases are conducted in accordance with due legal process. Persons who are charged for lese-majesty are entitled to the same rights as those charged for other criminal offences.

27. The Government also considers that the military court upholds the principles of independence and neutrality, similar to the court of justice. The military court must comply with the Criminal Procedure Code, which guarantees the right to a fair trial and the rights of defendants, such as the right to have legal assistance and the right to bail, in accordance with international standards, when putting civilians on trial.

28. All judges at the military court must have practised law within the military judicial system for no less than 20 years and are required to have the same set of knowledge and expertise in criminal law as judges in civilian courts.

29. Thai law also provides that judges, in both the court of justice and military courts, may use discretion as to whether to hold closed trials in the interests of public order, good morals or national security, if the cases are deemed to involve sensitive matters. This is consistent with article 14 of the Covenant and not dissimilar to the practice in other countries.

30. No further information was received from the Government afterwards. The Government's initial clarifications contain general arguments for the lese-majesty law and the military court but no specific details regarding Ms. Chayapha's arrest, detention and imprisonment or their factual and legal justification or assurances of her physical and mental integrity, as requested by the Working Group.

31. While the Working Group will take into consideration the information obtained from the Government's initial clarifications in rendering its opinion, it notes that they cannot be properly considered a "response" for the purpose of paragraphs 15, 16 and 21 (c) of its methods of work.

Further comments from the source on the Government's initial clarifications

32. On 10 April 2018, the initial clarifications from the Government were sent to the source for further comments. In its response of 13 April 2018, the source states that the Government has repeated, verbatim, many of its previous responses to communications sent by United Nations bodies on the issue of lese-majesty as well as the use of military courts for trials of civilians accused of violating section 112 of the Thai Penal Code (lese-majesty). According to the source, the Government has consistently failed to provide detailed reasoning as to why it believes that the arrests made, detentions carried out and lengthy jail sentences handed down in application of section 112 are in compliance with article 19 of the Covenant. It has also repeatedly failed to specifically address the use of military courts to try defendants in lese-majesty cases, which contravenes article 14 of the Covenant.

33. The source presents examples of earlier responses of international human rights bodies concerning the lese-majesty law. Firstly, it is noted that, in its concluding observations on the second periodic report of Thailand, adopted on 23 March 2017 (CCPR/C/THA/CO/2), the Human Rights Committee expressed its concern that criticism and dissention regarding the royal family was punishable with a sentence of 3–15 years' imprisonment and also expressed its concern about extreme sentencing practices in lese-majesty trials. Furthermore, the source notes that, on 5 July 2017, during the review of the Government's combined sixth and seventh periodic reports under the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women stated that there was a tendency by the Thai police to abuse lese-majesty, and it questioned the role of military courts in lese-majesty trials.

34. The source also details its concerns over the ongoing abuse of section 112 of the Penal Code. In that context, it submits that, from 22 May 2014 to 1 April 2018, 127 individuals were arrested under section 112 of the Penal Code. It also states that the abuse has continued, following King Maha Vajiralongkorn Bodindradebayavarangkun's accession to the throne as the new monarch, Rama X, on 1 December 2016. According to the source, from 1 December 2016 to 28 November 2017, at least 27 individuals were arrested for alleged violations of section 112 of the Penal Code. Almost half of the arrests allegedly resulted from the expression on social media of opinions perceived to be insulting to the monarchy. Moreover, the source submits that, under King Maha Vajiralongkorn, Thailand handed down the longest prison sentence ever imposed under section 112 of the Penal Code. On 9 June 2017, the Bangkok Military Court found a defendant guilty on 10 counts of lese-majesty for posting on Facebook, in December 2015, photos and comments deemed defamatory to the monarchy. The Court sentenced the person to 70 years in prison, reduced to 35 years, in consideration of the guilty plea. The source also submits that a 14-year old became the youngest person ever to be arrested for lese-majesty. On 25 May 2017, police in Khon Kaen held a press conference during which they reported that they had arrested nine people, including a 14-year old, for setting fire to roadside portraits of the late King Bhumibol and King Maha Vajiralongkorn in Baan Pai and Chonnabot Districts, Khon Kaen Province, on 3 and 13 May 2017.

35. The source claims that military tribunals have continued to try individuals and impose lengthy prison sentences for violations of section 112 of the Penal Code. Since 1 December 2016, the courts have convicted 10 individuals for lese-majesty offences. Of those 10 individuals, 3 were tried and convicted by military courts. As at 28 November 2017, there was a total of 27 ongoing lese-majesty cases in military courts. The source submits that, to date, the Government has not taken any measures to transfer the pending cases to civilian courts, despite numerous recommendations by human rights monitoring mechanisms. Trials of civilians in military courts have led to further violations of human rights, including the right to liberty and the right to a fair trial.

36. The source notes that the chances of defendants in lese-majesty cases being released on bail remain low. None of the individuals arrested for alleged violation of section 112 of the Penal Code after the accession of King Maha Vajiralongkorn to the throne have been granted bail. However, 6 of the 27 individuals in ongoing lese-majesty cases were released without charge. The source had no updates concerning the ongoing detention of Ms. Chayapha.

Discussion

37. In the absence of further information from the Government concerning Ms. Chayapha, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

38. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

39. The Working Group wishes to reaffirm that the Government has the obligation to respect, protect and fulfil the right to liberty of person and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights, the Covenant and other applicable international and regional instruments.[1] Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group must assess whether such detention is also consistent with the relevant provisions of international human rights law.[2] The Working Group considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.[3]

40. The Working Group would also like to reiterate that it applies a heightened standard of review in cases where the rights to freedom of movement and residence, freedom of asylum, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of peaceful assembly and association, participation in political and public affairs, equality and non-discrimination, and protection of persons belonging to ethnic, religious or linguistic minorities are restricted or where human rights defenders are involved. Ms. Chayapha's arrest, detention, trial and imprisonment for her messages require the Working Group to undertake this kind of strict scrutiny.[4]

Category I

41. The Working Group will examine the relevant categories applicable to its consideration of this case.

42. The Working Group notes that the Government has neither refuted nor addressed the allegation that Ms. Chayapha was arrested without a warrant, which was issued three days later, that she was not informed of the reasons for her arrest and that she was brought before a military court for a pretrial detention hearing, where she was informed of the reasons for her arrest six days after the event.

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[1] See General Assembly resolution 72/180, fifth preambular paragraph; Commission on Human Rights resolutions 1991/42, para. 2, and 1997/50, para. 15; Human Rights Council resolutions 6/4, para. 1 (a), and 10/9, para. 4 (b); and opinions No. 94/2017, No. 88/2017, para. 32, No. 83/2017, paras. 51 and 70, No. 76/2017, para. 62, No. 28/2015, para. 41, and No. 41/2014, para. 24.

[2] See opinions No. 94/2017, para. 47, No. 76/2017, para. 49, No. 1/2003, para. 17, No. 5/1999, para. 15, and No. 1/1998, para. 13.

[3] See opinions No. 94/2017, para. 48, No. 88/2017, para. 24, No. 83/2017, para. 60, No. 76/2017, para. 50, and No. 33/2015, para. 80.

[4] See opinions No. 94/2017, para. 49, No. 88/2017, para. 25, No. 83/2017, para. 61, No. 76/2017, para. 52, No. 39/2012, para. 45, No. 21/2011, para. 29, and No. 13/2011, para. 9. See also the Declaration on Human Rights Defenders (art. 9 (3)).

43. The international norms on detention include the right to be presented with an arrest warrant, except arrests that are made in flagrante delicto, which is inherent in the right to liberty and security of person and the prohibition of arbitrary deprivation under articles 3 and 9 of the Universal Declaration of Human Rights and article 9 (1) of the Covenant, as peremptory norms of customary international law.[5] Any form of detention or imprisonment should be ordered by, or be subject to the effective control of, a judicial or other authority under the law whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence, in accordance with principle 4 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

44. The lese-majesty and sedition charges against Ms. Chayapha rest upon her five Facebook messages, posted between 10 and 12 June 2015. It cannot be said that she was caught in flagrante delicto in the commission of any alleged crimes when the authorities arrested her on 19 June 2015. Moreover, the Bangkok Military Court issued her arrest warrant only on 22 June 2015. In its jurisprudence, the Working Group has consistently found that an offence is flagrant if the accused is either apprehended during the commission of a crime or immediately thereafter, or is arrested in hot pursuit shortly after a crime has been committed.[6] In the present case, Ms. Chayapha was arrested on the basis of five Facebook messages posted between 10 and 12 June 2015. In the view of the Working Group, she was clearly not arrested in flagrante delicto.[7] The Working Group underlines that any deprivation of liberty without a valid arrest warrant issued by a competent, independent and impartial judicial authority is arbitrary and lacks legal basis.[8]

45. The failure at the time of her arrest to inform Ms. Chayapha of the reasons for her arrest and of her rights and to inform her promptly of any charges against her further violated articles 3 and 9 of the Universal Declaration of Human Rights and articles 9 (2) and 14 (3) (a) of the Covenant, as well as principles 10 and 13 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The violations of the rights accorded universally to criminal suspects undermine the legal basis for her arrest and initial detention.

46. The Working Group notes that Ms. Chayapha was not brought promptly before a judge or other officer authorized by law to exercise judicial power, nor was she allowed to challenge the lawfulness of her detention before a court in accordance with article 9 (3) and (4) of the Covenant. Furthermore, in Ms. Chayapha's case, the Working Group finds it particularly troubling that the police failed to guarantee other fundamental guarantees, including prompt judicial review, while it organized a televised press conference for her "confession" on 24 June 2015, a day before her first presentation before a judge, on 25 June 2015.

47. For the reasons above, the Working Group considers that Ms. Chayapha's initial arrest and detention between 19 and 25 June 2015 lacked legal basis, in violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 of the Covenant. The Working Group therefore concludes that her detention is arbitrary under category I.

Category II

48. The Working Group recalls that the freedom of opinion and expression and the freedom of thought and conscience are fundamental human rights consecrated in articles 18 and 19 of the Universal Declaration of Human Rights and articles 18 and 19 of the Covenant.[9]

49. The Working Group notes that the Human Rights Committee, in its general comment No. 34 (2011) on the freedoms of opinion and expression, stated that restrictions

[5] See opinion No. 88/2017, para. 27.

[6] Opinion No. 36/2017, para. 85. See also opinions No. 53/2014, para. 42, No. 46/2012, para. 30, No. 67/2011, para. 30, and No. 61/2011, paras. 48–49; and E/CN.4/2003/8/Add.3, paras. 39 and 72 (a).

[7] See opinion No. 9/2018, para. 38.

[8] See opinion No. 93/2017, para. 44.

[9] See CCPR/C/78/D/878/1999, para. 7.2.

on the freedom of expression must not be overbroad and recalled that such restrictions must conform to the principle of proportionality, be appropriate to achieve their protective function, be the least intrusive instrument among those which might achieve their protective function and be proportionate to the interest to be protected. Moreover, the Committee, in paragraph 38 of that general comment, emphasized that all public figures were legitimately subject to criticism and political opposition, and expressed its concern regarding laws on lese-majesty, disrespect for authority, defamation of the Head of State and the protection of the honour of public officials, with a pointed reminder that laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. The Committee emphasized, in paragraph 42 of that same general comment, that the penalization of a media outlet, publishers or journalist solely for being critical of the Government or the political social system espoused by the Government can never be considered to be a necessary restriction of freedom of expression.

50. In the same vein, the Working Group notes that the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression reiterated that the right to freedom of expression includes the expression of views and opinions that offend, shock or disturb.[10] In addition, the Human Rights Council, in its resolution No. 12/16, paragraph 5 (p) (i), stated that restrictions on discussion of government policies and political debate are not consistent with article 19 (3) of the Covenant.

51. The aforementioned analysis sheds specific light on this case. Ms. Chayapha was arrested, detained, prosecuted and imprisoned under sections 112 (lese-majesty) and 116 (sedition) of the Penal Code for her Facebook messages allegedly referring to the royal family's involvement in politics and a purported military counter-coup against the junta.

52. The Government claimed, in its initial clarifications, that the lese-majesty law had the objective of respecting the rights or reputation of the royals and regents, a legitimate restriction upon the freedom of expression under article 19 (3) (a) of the Covenant. However, in the Working Group's assessment, the purported objective of the lese-majesty law can hardly be considered as a valid ground for a necessary restriction of freedom of expression, given that all public figures can be legitimately subject to criticism and political opposition. In this specific case, the Working Group cannot but also consider that the detrimental effects of the lese-majesty law and its application on Ms. Chayapha's freedoms and the chilling effect for the public far outweigh any potential benefits. In this vein, the Working Group has been unable to find Ms. Chayapha's deprivation of liberty under sections 112 (lese-majesty) and 116 (sedition) of the Penal Code, and criminal provisions per se, necessary or proportional for the purposes set out in article 19 (3) of the Covenant.

53. The Working Group notes that, on 8 July 2014, following the invocation of the nationwide martial law on 20 May 2014, the Government notified of its derogation from certain provisions of the Covenant, pursuant to article 4 of the Covenant. However, no derogation has been notified with regard to article 9 of the Covenant.[11] The Working Group expresses its concern at the broad and open-ended definition of terms used by the Government and cannot but consider that the lese-majesty legislation and prosecution are not necessary or proportional to the Government's stated purpose of affording vital national security protection in declaring martial law on 20 May 2014.

54. The Working Group therefore considers that Ms. Chayapha's deprivation of liberty is arbitrary under category II, as it resulted from her exercise of the rights or freedoms guaranteed under articles 18 and 19 of the Universal Declaration of Human Rights and articles 18 and 19 of the Covenant.

Category III

55. Given its finding that Ms. Chayapha's deprivation of liberty is arbitrary under category II, the Working Group wishes to emphasize that no trial of Ms. Chayapha should have taken place. However, with the trial having taken place, the Working Group will now

[10] See A/HRC/17/27, para. 37.

[11] See depositary notification C.N.479.2014.TREATIES-IV.4.

consider whether the alleged violations of the right to a fair trial and due process were grave enough to give her deprivation of liberty an arbitrary character, so that it falls within category III.

56. The Working Group considers that the Bangkok Military Court did not provide a public hearing, as required under article 14 (1) of the Covenant, given that Ms. Chayapha was tried, convicted and sentenced in closed sessions, from which observers from international human rights organizations and foreign diplomatic missions were excluded. None of the exceptions to that rule stipulated in article 14 (1), such as national security or public order, that would allow a trial to be closed to the public, can reasonably apply to her trial.[12]

57. In addition, to reiterate the Working Group's prior findings, Thai military courts cannot be considered competent, independent or impartial as required under article 10 of the Universal Declaration of Human Rights and article 14 (1) of the Covenant.[13] Thai military courts can hardly be considered independent of the executive branch of Government because military judges are appointed by the Commander-in-Chief of the Army and the Minister of Defence. Moreover, they lack sufficient legal training and sit in closed sessions as representatives of their commanders.

58. Trials of civilians and the placing of civilians in preventive detention by military courts are in violation of the Covenant and customary international law, as confirmed by the jurisprudence of the Working Group. The intervention of a military judge who is neither professionally nor culturally independent is likely to produce an effect contrary to the enjoyment of the human rights and to a fair trial with due guarantees.[14]

59. In addition, the Working Group notes that, in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Human Rights Committee stated that the guarantees of a fair trial under article 14 of the Covenant cannot be limited or modified because of the military or special nature of a court (para. 22). In the present case, Ms. Chayapha was informed of the nature and cause of the charges against her four days after her arrest, a delay for which the Government provided no explanation, in violation of article 14 (3) (a) of the Covenant. In addition, she was not informed of her right to legal assistance, did not have access to a lawyer when she was being interrogated by the police and was not given adequate time and facilities for the preparation of her defence, in breach of article 14 (3) (b) and (d) of the Covenant.[15]

60. The Government failed to respect Ms. Chayapha's presumption of innocence, in violation of article 11 (1) of the Universal Declaration of Human Rights, article 14 (2) of the Covenant and principle 36 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. In broadcasting her confession before trial, the Government violated her right to be presumed innocent and prejudiced her rights to a fair trial. The Working Group recalls that all public officials have a duty to refrain from prejudging the outcome of a trial, for example by abstaining from making public statements affirming the guilt of the accused.[16] While the presumption of innocence needs to be balanced with the public's right to information in a democratic society, the latter must be proportionate to the former.[17]

61. The Working Group would also like to consider the military court's refusal to grant Ms. Chayapha bail. Article 9 (3) of the Covenant requires that detention in custody of persons awaiting trial should be the exception rather than the rule, subject to guarantees of

[12] See also opinions No. 56/2017, para. 57, No. 51/2017, para. 42, and No. 44/2016, para. 31.

[13] Opinions No. 56/2017, para. 58, and No. 51/2017, para. 43.

[14] See A/HRC/27/48, para. 68.

[15] See also United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, principle 9, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principles 10, 11 (1), 15 and 17–19.

[16] See opinion No. 33/2017, para. 86 (e). See also Human Rights Committee general comment No. 35 (2014) on liberty and security of person, and CCPR/C/69/D/770/1997 and Corr.1, paras. 3.5 and 8.3.

[17] See opinions No. 83/2017, para. 79, and No. 57/2017, para. 56.

appearance, including appearance for trial, appearance at any other stage of the judicial proceedings and, should the occasion arise, appearance for execution of the judgment. Detention pending trial must be based on an individualized determination that it is reasonable and necessary, taking into account all the circumstances, for such purposes as to prevent flight, interference with evidence or the recurrence of crime. The relevant factors should be specified in law and should not include vague and expansive standards such as "public security". Nor should pretrial detention be mandatory for all defendants charged with a particular crime, without regard to individual circumstances, or ordered for a period based on the potential sentence for the crime charged, rather than on a determination of necessity.[18]

62. The Working Group notes with particular concern that only 4 of the 66 individuals (6 per cent) arrested for alleged violations of section 112 of the Penal Code after the military coup of 22 May 2014 were released on bail pending trial. In Ms. Chayapha's case, the Working Group considers that the military court cannot rely on the severity of potential punishment for lese-majesty offences to deny bail. It also considers that the near-blanket rejection of bail applications by those accused of lese-majesty offences casts serious doubt on the individualized determination of Ms. Chayapha's flight risk. The Working Group is therefore of the view that the Government has not fully met the burden of demonstrating the necessity for Ms. Chayapha's pretrial detention.

63. Given the above, the Working Group concludes that the violations of the right to a fair trial and due process are of such gravity as to give the deprivation of liberty of Ms. Chayapha an arbitrary character that falls within category III. Ms. Chayapha's guilty plea is of questionable validity as it is unlikely that informed consent or an informed decision can be made without legal counsel.

64. The Working Group wishes to express its grave concern about the pattern of arbitrary detention in cases involving the lese-majesty laws of Thailand. Given the increased usage of the Internet and social media as a means of communication, it is likely that the detention of individuals for exercising their rights to freedom of opinion and expression online will continue to increase until steps are taken by the Government to bring the lese-majesty laws into conformity with international human rights law.[19]

65. Given the continuing international concern regarding the country's lese-majesty laws, the Government may consider it to be an appropriate time to work with international human rights mechanisms to bring those laws into conformity with its international obligations under the Universal Declaration of Human Rights and the Covenant.

Country visit to Thailand

66. The Working Group would like to reiterate that it would welcome the opportunity to conduct a country visit to Thailand, in accordance with the request it made on 6 April 2017, so that it can engage with the Government constructively and offer assistance to address its serious concerns relating to the arbitrary deprivation of liberty.[20] The Working Group notes in particular the recent cases that it has considered.[21] The Working Group also notes that Thailand has issued a standing invitation to all special procedure mandate holders since 4 November 2011 and looks forward to an invitation to visit the country.

Disposition

67. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Chayapha Chokepornbudsri, being in contravention of articles 2, 3, 7, 9, 10, 11, 12 and 14 of the Universal Declaration of

[18] See A/HRC/19/57, paras. 48–58, and Human Rights Committee general comment No. 35 (2014), para. 38.

[19] See also opinions No. 56/2017, para. 72, and No. 51/2017, para. 57.

[20] See also opinions No. 56/2017, para. 73, No. 51/2017, para. 58, and No. 44/2016, para. 28.

[21] Opinions No. 56/2017, No. 51/2017, No. 44/2016, No. 15/2015, No. 43/2015, No. 41/2014, No. 19/2014 and No. 35/2012.

Human Rights and of articles 2, 9, 14, 15, 17 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II and III.

68. The Working Group requests the Government of Thailand to take the steps necessary to remedy the situation of Ms. Chayapha without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

69. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Ms. Chayapha immediately and accord her an enforceable right to compensation and other reparations, in accordance with international law.

70. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Ms. Chayapha and to take appropriate measures against those responsible for the violation of her rights.

Follow-up procedure

71. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Ms. Chayapha has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Ms. Chayapha;

(c) Whether an investigation has been conducted into the violation of Ms. Chayapha's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Thailand with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

72. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

73. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

74. The Government should disseminate through all available means the present opinion among all stakeholders.

75. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[22]

[*Adopted on 17 April 2018*]

[22] Human Rights Council resolution 33/30, paras. 3 and 7.

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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 4/2018 concerning Gaspar Matalaev (Turkmenistan)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group most recently extended for a three-year period in Council resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 17 January 2018, the Working Group transmitted to the Government of Turkmenistan a communication concerning Gaspar Matalaev. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Gaspar Matalaev, born in 1982, is a national of Turkmenistan who resides in Turkmenabad, the second-largest city in the country.

5. According to the source, Mr. Matalaev used to work as a minibus driver in the city of Turkmenabad. The source reports that, in addition to his official driving duties, he worked discretely as a human rights defender and an independent reporter for Alternative Turkmenistan News. In this connection, he had been reporting on the massive use of forced and child labour in the cotton fields, where tens of thousands of people were regularly forced to collect cotton under threat of punishment, including termination of employment. As a result of his activities as a monitor, Mr. Matalaev was arrested in October 2016, two days after he had published a report on the extensive use of forced labour and one day after the Minister of National Security had been reportedly severely reprimanded by the President at a State Security Council meeting for not "being able to control the appropriate government bodies".

6. According to the source, Alternative Turkmenistan News, an independent Internet news source that has been covering affairs on Turkmenistan for the past four years, has been critical of the repressive policies and practices of Turkmenistan and, as a result, has been known in the country as a critical voice outside the country.

Arrest, detention and interrogation

7. According to the source, Mr. Matalaev was arrested at his home on 4 October 2016 at around 11 p.m. The source reports that four police officers in plain clothes came to his house before midnight and asked to speak to him before arresting him without presenting a warrant. They also confiscated the mobile telephones of Mr. Matalaev and his brother. The source notes that the four men introduced themselves as police officers, but since they did not produce any identification, it is still unclear if they were actually police officers.

8. During the arrest, the officers stated that Mr. Matalaev was being arrested as a result of his posting of some photographs on the Internet. He had reportedly posted photographs on the Alternative Turkmenistan News website on 2 October 2016 that showed enforced cotton picking.

9. The source reports that since his arrest, Mr. Matalaev has been detained at the Turkmenabad City Police Station in Lebap Province, under the control of the Ministry of Internal Affairs. It is, however, unclear which department ordered Mr. Matalaev's detention since he has never seen any orders or papers related to it. Although he was kept at the local police station, he was interrogated by agents of the Ministry of National Security, which would seem to be an unusual practice given the charges presented by the Government. According to the source, agents of the Ministry of National Security are normally involved in sensitive political cases.

10. After his arrest, the whereabouts of Mr. Matalaev were reportedly unknown to his family for several hours. The morning after his arrest, his family received a call from his telephone saying that he would be released within a couple of hours. However, he was not released as promised. The family was also told that they would be able to see him on 6 October and to bring him clothes and food. However, the family was not allowed to see him on that day either. The clothes and food brought by his family were accepted by the authorities. The source reports that the family and relatives of Mr. Matalaev did not have access to him throughout his pretrial detention, that is from his arrest on 4 October 2016 until his trial on 8 November 2016. The police reportedly did not provide his relatives with any reasonable explanation or grounds to deny their requests to visit him.

11. According to the source, Mr. Matalaev was held without charges for 15 days, and he was only officially charged on 21 October 2016 with fraud (art. 228, part 2) and bribery (art. 185, part 2), in conjunction with an article specifying the types of accomplices (art. 33, part 4) of the Criminal Code of Turkmenistan.

12. The source alleges that Mr. Matalaev was repeatedly tortured with, among other things, electric shocks in order to make him confess.

13. Under the official charges of fraud, the State reportedly maintained that Mr. Matalaev had taken, by deceit, a sum of 2,400 manat (equivalent to $685) from one of his female friends, and in return had promised to find her a job within three months as an assistant cook at the Farab branch of the Chinese National Petroleum Corporation. Furthermore, the State contended that Mr. Matalaev had appropriated the money and failed to fulfil the promise.

14. According to the source, the female friend of Mr. Matalaev was arrested and detained by the police for 15 days at approximately the same time as Mr. Matalaev himself. Soon after her release, the charges against Mr. Matalaev were filed. The friend had reportedly joined Mr. Matalaev on labour-monitoring missions, and she had allegedly been arrested and questioned as a result of her human rights activities. The source notes that, due to the difficulties in communicating and the lack of access to sources of information, it remains unknown whether she was tortured in order to make these statements and testify against Mr. Matalaev. According to the source, it remains clear, however, that the statements by the female friend were mostly likely the result of police pressure. The statements were written in a formal legal language, using standard phrases that she would not normally use. It is worth noting that Mr. Matalaev was accused solely on the basis of his female friend's testimony, which was not corroborated in court.

15. The source reports that Mr. Matalaev was provided with a State-appointed lawyer without informing him or his family. However, the lawyer did not represent Mr. Matalaev in an effective manner, failing to present evidence in court to defend him against the charges put forward by the State. Through his family, Mr. Matalaev was subsequently able to hire another, independent lawyer. However, this lawyer reportedly faced serious obstacles to represent Mr. Matalaev effectively. He had very limited access to Mr. Matalaev during the trial and to the documents and materials of the case. It is known that the lawyer saw his client only twice, once during the trial and once afterwards. In addition, the lawyer and Mr. Matalaev only received the trial court's judgment several months later in April 2017.

16. According to the source, a State investigator requested the family of Mr. Matalaev to pay the disputed amount to his female friend in order to remedy her situation. His relatives were reportedly led to believe that if they paid the amount back, the case against him would be dropped. Following this guidance, they paid the requested sum of money to the investigator before the trial, but the authorities did not close the case. The source underlines that the payment was not made with any admission of guilt on the part of Mr. Matalaev. After his arrest, the members of Mr. Matalaev's family became subjects of interest for the officials, and the authorities allegedly started to gather information about them at their places of employment.

Trial proceedings

17. The source reports that, on 8 November 2016, after a trial before the Criminal Court of Turkmenabad that lasted approximately 10 minutes, Mr. Matalaev was found guilty of fraud and bribery and sentenced to three years' imprisonment in the labour camp in Seydi, a desert prison in a remote part of eastern Turkmenistan.

18. According to the source, the court decision was based on the evidence presented by the State. Mr. Matalaev was found guilty of fraud in accordance with article 228, part 2, of the Criminal Code, as it was maintained that he had acquired a sum of money from his female friend by deceit and, instead of finding her employment, he had spent some of the money to repair his car. However, no evidence was provided to support this argument.

19. The State also maintained that Mr. Matalaev was guilty of bribery. It reportedly applied article 185, in conjunction with article 33, part 4, of the Criminal Code and claimed that Mr. Matalaev was an "instigator" in giving a bribe to the representative of the Chinese National Petroleum Corporation in return for employment for his female friend. However, the State did not corroborate this claim, nor did it identify a person or official who had received the bribe.

20. According to the source, the Court also decided to confiscate the money that the family of Mr. Matalaev had paid to remedy the situation of the female friend, as well as Mr. Matalaev's mobile telephone, stating that both were material evidence as they were used to commit crimes. The Court reportedly found Mr. Matalaev guilty on the basis of witness statements and other documents. However, no witnesses were examined or cross-examined in court, nor was the other evidence used to support the charges introduced during the trial that lasted only 10 minutes. The source notes that the only time Mr. Matalaev spoke during the hearing was to provide his biographical information and to present his guilty plea. In this respect, the source notes that since Mr. Matalaev is ethnic Kazakh, he did not fully understand the procedural language and thus was not able to agree knowingly to the charges.

21. The source reports that two lawyers were present during the hearing: one was State-appointed and the other was the independent lawyer hired by the family. No mass media representatives were allowed to attend the hearings. Neither Mr. Matalaev, nor his lawyer received a copy of the judgment until April 2017. According to the source, Mr. Matalaev did not appeal his sentence to a higher court fearing for his safety, including torture in prison.

22. The source indicates that the international human rights community launched a campaign against the imprisonment of Mr. Matalaev, exposing the political nature of his prosecution. They believe that if it had not been for political reasons, Mr. Matalaev would have been pardoned because reportedly many prisoners who are convicted of similar misdemeanours are normally pardoned.

23. In this respect, the source notes that under the current President who has been in power since 2006, several pardons have been granted each year. This practice differs from previous years when the President would pardon prisoners only once a year. A number of recent pardons were reportedly granted after the arrest of Mr. Matalaev: in December 2016, 560 people were pardoned; in February 2017, 828 people were pardoned; in June 2017, 1,029 people were pardoned; and in October 2017, 1,600 people were pardoned. According to the source, the fact that Mr. Matalaev was not pardoned on any of those occasions most likely indicates that his case is politically motivated.

24. The source also notes that the Human Rights Committee, in its concluding observations on the second periodic report of Turkmenistan, expressed its concern at the continuous use of harassment, intimidation, torture and arbitrary arrests, detention and convictions on reportedly politically motivated charges as a retaliatory tool against journalists, human rights activists, dissidents, members of religious groups and ethnic minorities, and members of non-governmental organizations interacting with foreigners, such as Mr. Matalaev.[1]

Analysis of violations

25. The source submits that the arrest and detention of Mr. Matalaev constitute an arbitrary deprivation of his liberty under categories I, II and III of the categories applicable to the consideration of cases by the Working Group.

Violation of category I — no legal basis

26. The source notes that, according to the Code of Criminal Procedure, the grounds upon which a person can be stopped, searched, arrested or detained, as well as the requirements for a detainee to remain in pretrial detention, are broad and not clearly defined.

27. The source also notes that, besides the vague provisions and weak guarantees contained in articles 140, 144, 149, 163, 172 and 187 of the Code of Criminal Procedure, no other safeguards are in place for the protection of persons deprived of their liberty. The source alleges that, since these norms are vague and not clearly defined as required by the Covenant, it is easy, in practice, for the State machinery to violate the provisions of article 9

[1] See CCPR/C/TKM/CO/2, para. 42 (d).

of the Covenant. In this respect, the source refers to paragraph 22 of the Human Rights Committee's general comment No. 35 (2014) on liberty and security of person, whereby any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.

28. The source underlines that, even if the local norms are vague and not clearly defined, the rights of Mr. Matalaev were violated under such norms as well. He was arrested without a warrant, he was not informed of the grounds for his arrest as outlined in article 140 of the Code of Criminal Procedure and he was kept in detention without being informed or charged for 15 days in violation of article 149 of the same Code. According to the source, it is thus clearly impossible to identify any legal basis to justify his detention, in accordance with category I.

29. As a consequence, the source submits that, because the Government failed to meet both national and international procedural safeguards for the arrest and detention of Mr. Matalaev and provide any substantive basis upon which to detain him, his deprivation of liberty was clearly arbitrary and unlawful, in violation of article 9 (1) of the Covenant and the relevant national legislation.

Violation of category II — substantive fundamental rights

30. The source notes that freedom of expression and opinion is guaranteed both by article 28 of the Constitution of Turkmenistan and international human rights treaties ratified by the State, in particular article 19 of the Covenant.

31. The source submits that Mr. Matalaev's exercise of this right prompted the Turkmen authorities to arrest, detain and heavily sentence him. He was arrested and subjected to detention merely on account of his desire to express an opinion, notably to inform and raise awareness among the international community about the human rights situation and unfair practices of forced labour in the cotton fields of Turkmenistan.

32. The source acknowledges that the right to freedom of expression and opinion, as enshrined in article 19 of the Covenant, is not an absolute right as it can be restricted on the following grounds: respect for the rights or reputations of others; and the protection of national security or of public order (*ordre public*), or of public health or morals. However, the source submits that none of those grounds arose in this particular case to justify the actions of the State, which has not demonstrated that the restriction was necessary in accordance with the terms of the provision. The source thus submits that Turkmenistan violated Mr. Matalaev's rights to freedom of expression and opinion, and also to peaceful assembly, which are guaranteed by articles 19 and 21 of the Covenant and articles 19 and 20 of the Universal Declaration of Human Rights, as a result of which he was subjected to arbitrary deprivation of liberty based on trumped-up charges.

33. The source underlines that the Government of Turkmenistan responded to Mr. Matalaev's peaceful and legitimate human rights activism through unwarranted arrest and detention, unfounded criminal charges and, finally, through imprisonment without guaranteeing the right to due process. The source asserts that the Government has also violated Mr. Matalaev's rights as a human rights defender, in particular articles 6 and 9 of the Declaration on Human Rights Defenders. In this context, the source notes that the sentence imposed on Mr. Matalaev "solely for exercising his rights" has a recognized chilling effect, not only on his rights, but also on those of other members of civil society at large whose criticism is silenced due to fear of similar government retaliation.

34. The source further submits that Mr. Matalaev's deprivation of liberty results from the exercise of his right to political participation and has placed "unreasonable restrictions" on "the right and the opportunity" of Mr. Matalaev to take part in public affairs for two distinct reasons. First, as demonstrated above, his detention stems from an act of civil participation as a journalist and human rights defender, and his arrest, detention and criminal prosecution amount to punitive restrictions on the very act of exercising his civil rights as a citizen, which are undoubtedly "unreasonable restrictions" in violation of article 25 of the Covenant and article 21 of the Universal Declaration of Human Rights. Second, given that Mr. Matalaev has no opportunity to engage in public affairs due to his current

detention, the Government has placed "unreasonable restrictions" on his opportunity to engage in political discourse.

Violation of category III — right to due process

35. According to the source, the failure of the State to inform Mr. Matalaev of the reasons for his arrest constituted a violation of article 9 (2) of the Covenant. He was not presented with an official warrant for his arrest. He and his family were told that he was being arrested because he had allegedly put photographs on the Internet, and no other valid reasons for his arrest were provided. The authorities did not describe what kind of photographs on the Internet were the reason for the detention, how the existence of those photographs served as a reason for the arrest and how his actions violated the law. Furthermore, he was kept unaware of the official reasons for his detention until the criminal charges were announced to him on 21 October 2016, 15 days after his arrest.

36. The source also submits that the substantial period of pretrial detention, without being brought before a judge to contest the charges, constituted a violation of article 9 (3) of the Covenant. In addition, Mr. Matalaev was held incommunicado from 4 October to 8 November 2016, as he did not have access to his family and the access to the "independent" lawyer who represented his interests was severely limited. The lawyer saw Mr. Matalaev only once before the trial, and the State-appointed attorney, while he had access to Mr. Matalaev, was neither independent nor competent to effectively represent his interests. In addition, the source notes that Mr. Matalaev was denied his right to release pending trial, which as a general rule should be conferred on persons charged of a crime under article 9 (3) of the Covenant.

37. The source further submits that the failure of the State to guarantee the right of Mr. Matalaev to be brought promptly before a judge in order to contest the charges against him constituted a simultaneous violation of the right to habeas corpus, which is embodied in article 9 (4) of the Covenant.

38. As a consequence, the State has reportedly failed to meet both the national and international procedural safeguards in the course of arresting and detaining Mr. Matalaev and to provide any substantive basis upon which to detain him, which makes his arrest and detention clearly arbitrary and unlawful.

39. The source asserts that Mr. Matalaev's detention is arbitrary and unlawful because he was subject to torture and cruel punishment, in violation of article 7 of the Covenant and articles 2 and 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He was allegedly tortured with electric shocks and repeatedly subjected to acts amounting to torture in order to make him confess to the crime that the Government had charged him with. The source notes that, under these grave circumstances of fear of torture, Mr. Matalaev was not able to file a complaint with the authorities to ask for a proper investigation, as required under articles 7 and 12 of the Convention against Torture.

40. The source also asserts that Mr. Matalaev was not able to exercise his right to a fair trial and that the trial procedures before the Criminal Court failed to adhere to established national and international standards. The trial hearing lasted for about 10 minutes and the Court was not impartial. It failed to objectively review the case of Mr. Matalaev since witnesses were not examined or cross-examined, prosecutors failed to present sufficient evidence and he was not able to understand the language used in the courtroom.

41. The source notes that the impartiality and independency of the Court must be called into question since it found Mr. Matalaev guilty within 10 minutes of a trial that, on the basis of any objective reasonable standard, cannot be considered adequate to consider all the evidence and to examine witnesses. Such facts indicate that the Court made its decision prior to the trial, which is a clear violation of the principle of the presumption of innocence.

42. According to the source, Mr. Matalaev was appointed a State lawyer who did not represent him effectively, failing to provide an adequate defence. While the family was able to find a new lawyer, the stifling political environment in Turkmenistan reportedly means that defence lawyers prefer not to be involved in criminal cases so as to avoid possible

retaliation. Even after obtaining new legal representation, Mr. Matalaev still did not get effective legal assistance because the new lawyer had very limited access to him. The new lawyer met Mr. Matalaev only twice, once before the trial and once after it.

43. The source states that this set of circumstances clearly affected the trial of Mr. Matalaev. He was tried and sentenced in just 10 minutes on the basis of uncontested witness testimonies, including preliminary declarations made by witnesses who were not present at the trial and that of the female friend of Mr. Matalaev, who was the State's main witness and who was not examined during the trial.

44. In the light of the foregoing, the source submits that Mr. Matalaev did not benefit from a fair hearing conducted by an independent and impartial tribunal, in violation of articles 9 and 14 of the Covenant, article 11 of the Universal Declaration of Human Rights, principles 15, 16, 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and national procedural law.

Response from the Government

45. On 17 January 2018, the Working Group transmitted the allegations from the source to the Government through its regular communication procedure. The Working Group requested the Government to provide, by 19 March 2018, detailed information about the current situation of Mr. Matalaev and any comments on the source's allegations.

46. The Working Group regrets that it did not receive a response from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

47. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

48. The Working Group has, in its jurisprudence, established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

49. The source has submitted that the detention of Mr. Matalaev is arbitrary and falls under categories I, II and III. The Working Group shall consider these in turn.

50. The source argues that the arrest of Mr. Matalaev had no legal basis since his arrest was based on vaguely formulated legal provisions, since he was not presented with an arrest warrant at the time of his arrest, and since he was kept in detention for 15 days without being informed of any charges against him. The Working Group notes that the Government has chosen not to reply to these submissions, although it had the opportunity to do so.

51. The Working Group recalls that article 9 (2) of the Covenant requires that anyone who is arrested is not only promptly informed of the reasons for arrest but also promptly informed of any charges against them. The right to be promptly informed of charges concerns notice of criminal charges and, as the Human Rights Committee has noted in paragraph 29 of its general comment No. 35, this right applies in connection with ordinary criminal prosecutions and also in connection with military prosecutions or other special regimes directed at criminal punishment.

52. The Working Group notes that, while Mr. Matalaev was arrested without a warrant, the officers arresting him said that he was being arrested for posting some photographs on the Internet. The Working Group also notes that this was not the real reason for Mr. Matalaev's arrest as was later evidenced by the charges and his trial. Moreover, following the arrest, Mr. Matalaev was kept in detention for 15 days without any notification of the charges against him. The Working Group therefore concludes that there has been a breach of article 9 (2) of the Covenant.

53. Furthermore, in order to establish that a detention is indeed legal, anyone detained has the right to challenge the legality of his or her detention before a court, as envisaged by article 9 (4) of the Covenant. The Working Group wishes to recall that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[2] This right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty,[3] applies to all situations of deprivation of liberty, including not only detention for purposes of criminal proceedings, but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes.[4] Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[5]

54. The Working Group notes that, in order to ensure an effective exercise of this right, the detained persons should have access, from the moment of arrest, to the legal assistance of their own choosing as stipulated in the Basic Principles and Guidelines.[6] This was denied to Mr. Matalaev, which had a serious adverse impact on his ability to effectively exercise his right to challenge the legality of his detention, denying him his rights under article 9 (4) of the Covenant.

55. The Working Group therefore concludes that, since the detention of Mr. Matalaev took place without an arrest warrant, since no formal charges were brought against him for 15 days and since he was effectively prevented from exercising his right to challenge the legality of detention, his arrest and detention is arbitrary and falls under category I.

56. The source further argues that the detention of Mr. Matalaev falls under category II since his detention was a direct result of his exercise of the freedom of expression and opinion as guaranteed by article 19 of the Covenant. The Working Group notes that the Government has chosen not to reply to these submissions, although it had the opportunity to do so.

57. The Working Group notes that, as the Human Rights Committee states in its general comment No. 34 (2011) on the freedoms of opinion and expression, freedom of opinion and freedom of expression as expressed in article 19 of the Covenant are indispensable conditions for the full development of the person; they are essential for any society and, in fact, constitute the foundation stone for every free and democratic society.

58. In the same general comment, the Committee states that freedom of expression includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers, and this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions. Moreover, the permitted restrictions to this right may relate to respect for the rights or reputations of others, or the protection of national security, public order (*ordre public*) or public health or morals. As the Human Rights Committee has stipulated, restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions on other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.

[2] See A/HRC/30/37, paras. 2–3.
[3] Ibid., para. 11.
[4] Ibid., annex, para. 47 (a).
[5] Ibid., para. 47 (b).
[6] Ibid., principle 9.

59. In the present case, although the charges brought against Mr. Matalaev appear not to be connected to his activities as a human rights defender and his reporting on forced labour in Turkmenistan, the Working Group notes that the Human Rights Committee, in the above-mentioned concluding observations on the second periodic report of Turkmenistan, expressed its concerns at the continuous use of harassment, intimidation, torture and arbitrary arrests, detention and convictions on reportedly politically motivated charges as a retaliatory tool against journalists, human rights activists, dissidents, members of religious groups and ethnic minorities, and members of non-governmental organizations interacting with foreigners, such as Mr. Matalaev.

60. The Working Group also notes that the present case has been the subject of a joint allegation letter sent on 1 May 2017 by the Working Group, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and acknowledges the response from the Government to this joint communication.[7]

61. The Working Group is convinced that the present case against Mr. Matalaev is an attempt by the Government to censor his activities as a human rights defender and curtail his freedom of expression. The Working Group therefore concludes that the detention of Mr. Matalaev is arbitrary and falls under category II. The Working Group refers the present case to the Special Rapporteur on human rights defenders for appropriate action.

62. Given its finding that the deprivation of liberty of Mr. Matalaev is arbitrary under category II, the Working Group wishes to emphasize that the trial should never have taken place. However, the trial did take place and the source has submitted that there were severe violations of the right to a fair trial and that Mr. Matalaev's subsequent detention therefore falls under category III.

63. In particular, the source has submitted that Mr. Matalaev was held incommunicado from 4 October to 8 November 2016; he had no access to his lawyer or family; the lawyer appointed by the State did not properly represent his interests while the lawyer chosen by himself was denied access to the full case file; he was subjected to torture and ill-treatment to extract a confession; the Court hearing in which he was found guilty lasted only 10 minutes; he did not fully understand the language spoken at the hearing; and the final judgment was not provided to his lawyer until some five months later. The Working Group notes that the Government has chosen not to reply to these submissions, although it had the opportunity to do so.

64. The Working Group is very concerned at the allegations, uncontested by the Government, that Mr. Matalaev was held in incommunicado detention for over a month prior to his trial. The Working Group in its practice has always consistently argued that holding persons incommunicado breaches the right to challenge the lawfulness of detention before a judge.[8] Articles 10 and 11 of the Universal Declaration of Human Rights also confirm the impermissibility of incommunicado detention. Furthermore, the Committee against Torture has made it clear that incommunicado detention creates conditions that lead to violations of the Convention against Torture;[9] the Special Rapporteur on torture has consistently argued that the use of incommunicado detention is unlawful;[10] and the Human Rights Committee, in its general comment No. 35, has stated that incommunicado detention that prevents prompt presentation before a judge inherently violates article 9 (3).

65. Equally, the Working Group is seriously concerned at the allegations of torture and ill-treatment and the extraction of a confession made by the source in relation to Mr. Matalaev, especially noting that the Government has not contested these allegations. The treatment described would appear to reveal a prima facie breach of the absolute prohibition

[7] AL TKM 1/2017. Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23099.

[8] See, for example, opinions No. 56/2016, No. 53/2016, No. 9/2017 and No. 10/2017.

[9] See, for example, A/54/44, para. 182 (a).

[10] See, for example, A/54/426, para. 42; and A/HRC/13/39/Add.5, para. 156.

of torture, which is a peremptory norm of international law, as well as of the Convention against Torture, to which Turkmenistan is a party, principle 6 of the Body of Principles and rule 1 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

66. The Working Group also notes that the use of a confession extracted through ill-treatment that is tantamount, if not equivalent, to torture may also constitute a violation by Turkmenistan of its international obligations under article 15 of the Convention against Torture. Furthermore, the Body of Principles specifically prohibits taking undue advantage of the situation of a detained person to compel him or her to confess or make incriminating statements (see principle 21).[11] It is also a breach of article 14 (3) (g) of the Covenant. The Working Group refers the present case to the Special Rapporteur on torture for appropriate action.

67. The Working Group has already established a violation of article 9 through the denial of legal assistance to Mr. Matalaev during his pretrial detention. The Working Group considers that this violation continued and in fact constituted a further breach of article 14 (3) (b) of the Covenant as the lawyer that Mr. Matalaev chose to represent him faced numerous impediments imposed by the authorities that prevented him from effectively representing the rights of his client. The Working Group thus observes that he was unable to meet with his client freely and was denied access to the documents and materials of the case. This is not only a violation of article 14 (3) (b) of the Covenant, but also of principle 17 (1) of the Body of Principles and principle 9 of the Basic Principles and Guidelines.

68. The Working Group also observes that Mr. Matalaev's right to have his sentence reviewed by a higher tribunal (article 14 (5) of the Covenant) was violated as the final judgment of the court was not given to him or his lawyer until some five months later. This delay prevented Mr. Matalaev from exercising his right to appeal promptly, as well as denying him his right to a prompt hearing as enshrined in article 14 (3) (c) of the Covenant.

69. The Working Group further notes the submission that Mr. Matalaev, an ethnic Kazakh, did not fully understand the language used in court, a claim that the Government has chosen not to contest. This is a further breach of article 14 (3) (f) of the Covenant.

70. The Working Group is disturbed by the submission made by the source that the trial of Mr. Matalaev on 8 November 2016, which resulted in his conviction and a sentence to three years' imprisonment, lasted only 10 minutes. The Working Group observes that the Government has chosen not to contest this submission, although it had the opportunity to do so.

71. In the view of the Working Group, this is a blatant violation of the guarantees of a fair trial and of equality of arms as enshrined in article 14 of the Covenant since a trial of only 10 minutes cannot, under any circumstances, be said to fulfil such guarantees. In such a short period of time, it would have been impossible for the prosecution to present its case and witnesses, let alone for Mr. Matalaev and his lawyers to present their defence, examine the prosecution witnesses and present their own witnesses. In fact, it appears to the Working Group that the hearing on 8 November 2016 was nothing more than a mere "rubber stamping" of a predetermined decision.

72. Moreover, the denial of full access to the case file to the lawyer of Mr. Matalaev is a serious violation of the principle of equality of arms under article 10 of the Universal Declaration of Human Rights and of article 14 (1) and (3) (b) of the Covenant concerning the right to a fair hearing and to have adequate time and facilities for the preparation of his or her defence in full equality.[12] Since the Government did not submit any information in response to the Working Group's regular communication, it has therefore not demonstrated why restricting access to the case file was necessary and proportionate in pursuing a

[11] See also opinions No. 48/2016, No. 3/2017, No. 6/2017 and No. 29/2017.

[12] See, for example, opinions No. 19/2005, para. 28 (b); No. 50/2014, para. 77; No. 89/2017, para. 56; and No. 18/2018, paras. 52–53, in which the Working Group reached a similar conclusion on the violation of the principle of equality of arms when classified information is withheld from the defendant.

legitimate aim, such as national security. The Working Group considers that such a denial of access to the case file is a violation of article 14 of the Covenant.

73. Consequently, the Working Group finds that the detention of Mr. Matalaev resulted from a trial that totally ignored the international norms relating to the right to a fair trial and especially his rights under article 14 (1) (3) (a) (b) (c) (g) (f) and (5) of the Covenant. These violations were of such gravity as to render the detention of Mr. Matalaev arbitrary, falling under category III.

74. Finally, the Working Group is of the view that the arrest and subsequent detention of Mr. Matalaev is a targeted action by the Turkmen authorities against a prominent human rights defender in the country. The Working Group takes special note of the fact that: Mr. Matalaev is an independent reporter for Alternative Turkmenistan News, a voice critical of the Turkmen authorities; he was arrested only two days after the publication of his report on the extensive use of forced labour in Turkmenistan; the reasons that were given to him at the time of his arrest (publication of photographs) were false since he was charged with entirely different offences; and his case appears to have been deliberately excluded from the presidential pardon. In the absence of any explanation from the Government, the Working Group therefore concludes that the detention of Mr. Matalaev also falls under category V on the basis of the discrimination against him as a human rights defender.

Disposition

75. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Gaspar Matalaev, being in contravention of articles 1, 2, 7, 9, 10 and 19 of the Universal Declaration of Human Rights and of articles 9, 14, 19 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

76. The Working Group requests the Government of Turkmenistan to take the steps necessary to remedy the situation of Mr. Matalaev without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

77. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Matalaev immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

78. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Matalaev, and to take appropriate measures against those responsible for the violation of his rights.

79. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on human rights defenders and the Special Rapporteur on torture for appropriate action.

Follow-up procedure

80. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Matalaev has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Matalaev;

(c) Whether an investigation has been conducted into the violation of Mr. Matalaev's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Turkmenistan with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

81. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

82. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

83. The Government should disseminate through all available means the present opinion among all stakeholders.

84. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[13]

[*Adopted on 17 April 2018*]

[13] See Human Rights Council resolution 33/30, paras. 3 and 7.